

# INTERNATIONAL ASSOCIATION OF JUDGES

## QUESTIONNAIRE ON THE IMPACT OF THE COVID-19 PANDEMIC ON COURTS



Judicial Conference of Australia

### RESPONSE FROM THE JUDICIAL CONFERENCE OF AUSTRALIA

May 2020

**Note:** These responses from Australian courts report the situation at various points of time over the last few weeks or months. Since then further changes may have occurred; for example, in some jurisdictions jury trials have recommenced. All of these responses are unofficial insofar they do not purport to report officially the policy or practices of any courts in Australia.

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**1 What are the main problems your Court has experienced at a general level as a consequence of any legal reforms implemented in your jurisdiction, if any, in order to cope with the COVID-19 pandemic?**

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***Federal Court of Australia***

From the middle of March, the Court through Chief Justice Allsop took steps in the advance of announced restrictions by State and Territory Governments to adjust its operations. Those adjustments were to achieve at least two aims:

- (a) the first, to ensure the safety of staff, judges and the general public;
- (b) the second to attempt to keep the Court open and operational without interruption.

Each of those aims was quite heavily reliant upon technology.

The first technical challenge was to enable enough courtrooms with technology to permit appearances of counsel and parties away from the courtroom, with the judge or judges also remote or in a courtroom, but in a way that permitted reliable transcript. This took two or three weeks of intense work by the court's IT department. The platform used by the Court has been Microsoft Teams and, in this early period, steps were taken to ensure that Microsoft Teams could be used such that there was reliable transcript of any hearing and that there was no restriction on the number of courtrooms available for hearings that could be managed.

The second technical and logistical challenge was to arrange the setting up of judges, judges' staff, registrars and staff to work remotely from home. This was a large undertaking not without significant cost. Since around Easter, the whole Court, judges, their staff, registrars and staff generally have adapted to this fluid and, in some respects, restricted but also flexible environment. Significant adjustments have been made. Not everything works entirely smoothly. Some things work surprisingly smoothly. The Court is learning new skills and developing new capacities. Some judges are working from chambers, some from home. Many staff are working from home. Equipment of some value is spread across the suburbs of six capital cities. It is, however, being used to work tolerably efficiently. While that significant cost has been incurred, the cost of interstate and international travel in the Court has been very substantially diminished. The work of the Court in both allocation and hearing cases in occurring in some considerable volume now, probably at about 80%. Judges and staff are achieving this in a balanced way, getting used to the exigencies.

Although for good reason, some restrictions have eased, the Court does not consider there is any proper basis to abandon or depart significantly from the approach that has been taken to remote hearings, at least for now. Some judges are working from chambers, some staff may also, but the Court does not intend to move away from conducting hearings remotely, that is, by keeping litigants and the profession remote and away from Court buildings. This is so for at least two reasons. First, there is no basis to think that infection spikes or clusters are not possible or likely. If they are, sites such as the courts where members of the public are bound to congregate, are likely prime promoters of them. Secondly, the Court is now achieving much by its current method, hearing cases with minimal risk to the public, the profession, judges and staff and developing skills and capabilities which will be taken forward functionally into the future to some degree. Obviously,

as the Court comes back together in due course, caution will need to be exercised in ensuring there is a stable and safe environment.

At this stage, the only real matters that are on hold are those involving litigants who are unable to deal with the technology. Some litigants have stressed a preference to conduct their cases by telephone and they have been accommodated where that request has been made. Most of the cases involving the profession are being dealt with by video. The number of hearings by remote technology has grown from a handful to more than 60 a week at about 80% capacity as mentioned. There is no reason why represented parties, particularly in migration appeals, should not have their cases listed and determined. Usage of the video facility also opens up the capacity for a national bar by lawyers in one State arguing cases in another State or Territory.

The video technology does tend to suggest that there could be some economy in time management in case management hearings which can be argued perfectly capably by video without the need for court attendance. It is likely that this practice will continue when the COVID-19 crisis has concluded.

But, there are certain hearings, such as trials involving witnesses where physical court presence is preferable. Not every commercial trial with a witness demands a physical court preference, but many do and will. Obviously, the judicial process does ideally and conventionally involve a necessity for actual physical engagement, especially with witnesses. Much of the court's cases and appeals do not involve witness testimony.

### ***Family Court of Australia***

Initially, in mid-March, the Family Court of Australia imposed restrictions on the number of people (excluding judicial officers and Court staff) permitted to be present in a single courtroom at one time. The Court directed that any matters able to proceed by telephone ought be conducted in that way. Listings for urgent matters were to proceed however each judicial officer retained discretion as to the management of their own listings.

As the Federal Government moved to heighten restrictions on movement by the end of March, the Family Court moved to firm up the move to hear matters by electronic means with the imposition of a presumption that all matters be heard by telephone. Parties were however permitted to contact Chambers or an appropriate Registry officer and set out why it is either impracticable for the matter to proceed by telephone and that the matter is urgent. The judicial officer is then permitted to discretionarily determine how the matter should proceed. This has, on the whole, led to little to no in person appearances in the courtrooms of Family Court Judges.

The initial difficulty confronting the Family Court was a lack of resources to facilitate video conferencing required to allow trials to proceed. For example, the Brisbane Registry was limited to one set of video conferencing equipment shared between the Federal Circuit Court and the Family Court. As such the two Courts (who are fused in their management) undertook a widespread upgrade of their IT infrastructure. A move to implement the Microsoft Teams platform, which had been scheduled for later in the year, was brought forward in order to facilitate the Courts continued functionality.

Since the Family Court has moved to virtual trials and almost entirely e-filed material, there have been instances of both practitioners and litigants placing extensive, perhaps excessive, volumes of material before the Court. Further to this

many practitioners have taken to emailing documents to be relied upon to Chambers only very shortly before, or on occasion, during an appearance by telephone before the Court leading to Judges waiting for Chambers staff to locate and print material while in Court.

Given the nature of its jurisdiction, the Family Court is anticipating that as a result of the COVID-19 restrictions implemented by State authorities and the Federal government limiting movement there will be an increase in Applications where parents are unable to resolve difficulties that arise regarding changeovers and other aspect of the movement of children between households. The Family Court is further anticipating a likely increase in domestic violence over this period which is often prevalent in the matters before our Court. To attempt to alleviate or at least limit the prevalence of these issues the Family Court has established a dedicated COVID-19 list for urgent matters arising from the impact of the pandemic. The matters are reviewed by a national Registrar and if they meet the Court's threshold for urgency are listed before the next Judge with sitting availability. These listings may be listed before any Judge who is available in any Registry regardless of where the matter was filed in an effort to fast track them. Additionally, our Chief Justice has engaged widely with the Australian media to encourage parents to act cooperatively and practically in confronting difficulties impacting their parenting arrangements arising from the pandemic.

### ***Federal Circuit Court of Australia***

The Federal Circuit Court has faces similar issues as outlined by the Family Court above. The Family Court, Federal Circuit Court and the Federal Court share administrative services.

The Federal Circuit Court is a high volume trial court. Initially in mid-March it was necessary to adjourn many non-urgent cases. The IT team quickly implemented infrastructure upgrades urgently enabling hearings to be conducted by Microsoft Teams or telephone. The digital court file project was also brought forward. All new matters are electronically filed.

With respect to family law matters, the Chief Justice of the Family Court is also the Chief Judge of the Federal Circuit Court. He has given interviews and issued several press releases and guides including a guide for lawyers and litigants with respect to virtual hearings and Microsoft Teams. He has also issued joint practice direction for the two courts with respect to filing documents, inspecting subpoenas and signatures on documents and affidavits.

There number of urgent family law applications have increased by 23%.

The national COVID-19 list for urgent matters also operates in the Federal Circuit Court and is the subject of a joint practice direction. Matters are first assessed by a registrar and if necessary will be listed before a judge within 3 business days.

Circuits to regional areas are an important part of the Federal Circuit Court's work. Individual judges who manage the circuits have held meetings with local practitioners in advance of circuits and continue to conduct circuits via telephone and Microsoft Teams.

The Federal Circuit Court also has jurisdiction in a broad range of general federal law matters. Hearings are being conducted by telephone and Microsoft teams.

There has not been any appreciable increase in general federal law applications.

Interpreters are available to assist by telephone where required in all matters across the Court's jurisdictions.

### ***Magistrates Court of the Australian Capital Territory***

This court has not experienced any problems with legal reform, but does have some concerns that progressive measures put in place are dependent on the ongoing emergency and will lapse once the emergency passes.

### ***District Court of New South Wales***

Health directives mandated the postponement of all jury trials: when jury trials recommence, there will be a significant backlog of work. Whilst there may be adequate judicial resources to cope with such a backlog, there will be inadequate physical resources e.g. court rooms and Crown Prosecutors.

Health directions mandated personal appearances in Court being replaced by AVL civil hearings and some criminal matters e.g. sentences and appeals where relevant parties had access to audio visual link (AVL) facilities. This has also greatly impeded the despatch of proceedings because of inadequate physical facilities e.g. Sydney District Court has 19 civil courts, only 7 of which have AVL facilities and of these 2 are used for criminal matters; there has been an increase of 50% in Court Management Systems expressways increasing capacity but is still inadequate.

Many legal practitioners have difficulties using the AVL system and there is a belief, based on anecdotal experience, that the system is being manipulated by practitioners where e.g. they have not succeeded in obtaining an adjournment.

### ***Local Court of New South Wales***

The court has vacated all contested hearing dates except for Small Claims civil proceedings (where statements are tendered and no evidence is given in person, and legal practitioners/litigants appear by phone). It expects to set new dates for those hearings in the second half of the year. Wherever possible the priority that existed at the time the hearing dates were vacated will be maintained as new dates are allocated.

Magistrates continue to deal with part heard matters listed for submissions/decision, annulment applications and applications for diversion under the mental health legislation.

Case management and sentencing (except where the defendant is likely to get a full time custodial sentence) has continued although longer time frames have been built in.

The majority of case management in civil proceedings is being done by registrars using the online court. A significant percentage of documents in civil proceedings are e-filed.

The Chief Magistrate has been regularly communicating with the court, legal profession and community as changes are introduced to respond to the pandemic.

He has issued memorandums adjusting procedures and extending time frames to minimise the need for physical attendance at court.

Agencies are allowing a longer period between service of a court attendance notice and the first return date in the court. The State Debt Recovery Office has delayed listing new matters until October 2020. Legislation was enacted to facilitate the listing of provisional AVOs up to six months after the order was made.

There will be delays but the court expects these to be manageable. A limited number of locations have much larger backlogs and are likely to need extra assistance to deal with the backlog of contested hearings.

There was a significant increase in bail review applications in the early stages of the COVID-19 changes. This has now tapered off. Bail applications and reviews are all done by AVL and have been centralised to a few metropolitan and country locations.

The court has put measures in place to minimise the number of people who have to attend court in person. For example, defendants do not need to attend for sentence except where the court considers it necessary for them to do so.

Legal practitioners are generally communicating with the court by email or appearing by telephone/AVL. There have been some difficulties ensuring that the necessary paperwork is provided to other parties and put before the court at the appropriate time.

The changes have significantly increased the pressure and workload for court registries.

A real difficulty is the lack of AVL facilities in all courtrooms and “queuing” to make contact with the limited AVL facilities in correctional centres. Depending on the number of courts wishing to make contact with a particular correctional centre, it can take some time to be able to connect the courtroom to the correctional centre AVL suite where the defendant is located.

Many more courtrooms could be used if more AVL facilities were available. The AVL facilities are not always reliable and this causes problems in the courtroom.

### ***Supreme Court of the Northern Territory***

The Court has had to cancel jury trials for the time being because of the restrictions on the size of gatherings. This will lead to a backlog of cases when jury trials resume. This should be reasonably manageable provided the lockdown does not last too long. We have 5 jury capable court rooms in Darwin and 2 in Alice Springs. The court only has 6 judges but it has a number of acting judges who can take step in to help clear any backlog.

In the meantime the court is bringing forward guilty pleas which means that these are being dealt with more quickly than usual. This will also free up time for jury trials when they resume.

The court has had an increase in bail applications as a result of jury trial being cancelled. These are dealt with on a case by case basis.

The court is also dealing with a lot more matters by audio-visual link (AVL). Unless there is a reason to bring them in, prisoners are appearing via AVL from the prison on bail matters and pleas.

Some practitioners are also appearing by AVL – or even by telephone from home. Telephone appearances are less than satisfactory.

The biggest logistical problem concerns interpreters. Many Aboriginal people appearing in our courts are in need of an interpreter and the Aboriginal Interpreter Service is now offering only telephone interpreters for the duration of the emergency. (Many of the interpreters live in remote communities in which travel in and out has been suspended.) In normal times, defendants and witnesses often simply ask the interpreter for help when they need it. This cannot be done when the interpreter is on the telephone. When this occurs it is necessary for the interpreter to interpret everything that is said. That is hard to do when the interpreter cannot see when someone has finished speaking. It also slows proceedings down and counsel are not used to pausing to allow, say, a question from the bench, to be interpreted before answering it. Similar problems occur when the interpreter can appear by AVL but that is somewhat more successful.

### ***District Court of Queensland***

The postponement of jury trials has been the main impact of the COVID-19 pandemic. However, the Chief Judge quickly took initiatives to facilitate applications for judge-alone trials. There have been a number of such applications, so some trials have been able to proceed. Sentence hearings have continued. Appearances by defendants in custody have been through audio-visual link, which has worked satisfactorily.

### ***Land Court of Queensland***

- Inadequate physical and technical facilities to comply with social distancing and lock down requirements.
- Reluctance by some parties to embrace video-conferencing.
- Different levels of comfort with video-conferencing – larger and well resourced law firms use it well, but some counsel are concerned about taking evidence in this way.
- Difficulty in conducting concurrent expert evidence sessions (a frequently used procedure in this Court).
- Inability to travel and sit regionally and to conduct site inspections in person for mining projects and land disputes.
- Some difficulty for parties in filing originating proceedings as we cannot accept them electronically under our rules, although all other documents can be filed in that way.

### ***Magistrates Court of Queensland***

- Noncompliance by practitioners with distancing and demands on Registry led to a practice direction being formulated.
- Our court including appearances by phone / video at the same time.
- Initial adjournment of matters created a future formulated backlog.
- Adaptation to increase in electronic appearances, phone / videos.



- Pressure from the legal profession to maintain practitioner's income.
- As the pandemic curve flattened there has been more capacity to undertake more work.

### ***South Australian Employment Tribunal***

The main problems have been the effect of social distancing, restricted access and working from home, which has meant that many cases, both at the procedural level and at hearing, have been adjourned to later dates. The requests for adjournments are overwhelmingly from the parties and not at the direction of the Tribunal.

### ***Magistrates Court of South Australia***

Legal reforms in South Australia have included the introduction of new warrants to allow for the arrest of persons who do not comply with COVID-19 Emergency Directions, and reversal of presumption of bail provisions for certain offences during the COVID-19 Emergency Declaration. Whilst the number of these matters is negligible, the court has been required to develop forms and procedures to cater for these potential matters.

### ***Supreme Court of Tasmania***

Jury trials have been cancelled until at least 21 July. As Tasmanian legislation does not permit judge-alone criminal trials, this means that all criminal trials have been cancelled.

With one exception, civil cases involving witnesses are not being heard.

A number of steps have been taken to minimise the number of people attending court houses. Some judges and some staff are working from their homes. The legal profession have been encouraged to file documents electronically. Legal practitioners are being required or requested to participate in hearings by audio-visual link or by telephone. Prisoners are not being brought to court, but are appearing by AV link.

Although the logistics are complicated, practically all cases that do not involve oral evidence are proceeding. However the Court already had a serious backlog of criminal cases before the pandemic, and that backlog was getting worse at an increasing pace. When the pandemic ends, that backlog will be far worse.

### ***Magistrates Court of Tasmania***

The relevant legal reform in Tasmania is the Disease Emergency (Miscellaneous Provisions) Act 2020, s 20 to the effect that proceedings of courts and tribunals may be authorised to not be required to be held in public. Under that law, the Attorney-General empowered the Chief Magistrate to approve that all cases could be dealt with by audio or audio-visual link. Personal attendance at court was discouraged. Wherever there was a requirement for personal appearances by parties or witnesses in criminal cases – that was removed. Wherever there was previously a requirement for a proceeding to be heard and determined in an open, public court, that was also removed.

Further, because of the public health imperative to minimise the number of people gathering in the one place, the large majority of cases were adjourned for a period

of at least 3 months. These measures prevented an unknown number of people from having their cases finalised. These reforms will be responsible for a significant delay in a great many cases being resolved. They will create a substantial backlog for the court and delay justice for many parties and witnesses.

The Court now deals with as many cases as possible by phone or audio-visual platform (direct video link, Zoom, Skype). The court was required to increase its capacity to deal with cases in this way very quickly which was resource intensive and made significant demands on the magistrates and court staff because of the pace and intensity of change.

Since these measures were introduced, it has been observed that defendants in criminal matters may be more likely to appear at proceedings, presumably because of the ease of - and only minor disruption represented by - appearing by phone.

The Chief Magistrate (a) cancelled after hours courts on Friday evenings; and (b) halved the number of weekend after-hours courts, but required those courts to be convened by magistrates rather than lay 'bench justices'. The latter measure involves a substantial increase in judicial and administrative resources.

### **Supreme Court of Western Australia**

The main legal reforms that have impacted on court operations have been:

- the Prohibited Gathering Directions dated 31 March 2020 (made under the *Emergency Management Act 2005* (WA)) which limited gatherings to two persons;
- the Self-Isolation Following Positive Test or Diagnosis Directions dated 22 March 2020 (made under the *Emergency Management Act 2005* (WA)) requiring isolation in accordance with the directions of a responsible officer from the Department of Health;
- the Self-Quarantine Following Overseas Travel Directions dated 18 March (made under the *Emergency Management Act 2005* (WA)) requiring a 14 day isolation period for those arriving from any place outside Australia; and

the State Government's social-distancing policy requiring 1.5m separation between people.

The Prohibited Gathering Directions did not directly apply to the Court, as an exempted essential service and workplace (clause 8(k)). However, as a precautionary measure and to ensure that essential services continue to be provided, the Court has kept gatherings at a minimum. There was concern that were one person in a courtroom (judge, defence counsel, prosecutor or juror) to contract COVID-19 it could lead to the trial being delayed or aborted due to the operation of the Self-Isolation Following Positive Test or Diagnosis Directions. It could also derail other trials (e.g. where a prosecutor is to appear in another subsequent trial, or other prosecutors in their office are also required to isolate following transmission).

The issues have been most pronounced in relation to jury trials, as:

- jury boxes and deliberation areas are not, and currently could not be, set up for 1.5m distancing;
- a large number of people are summonsed to attend for jury duty and then required to be in one area (approximately 300);
- twelve people are required to be in close proximity for an extended period of time; and

- jurors are under a legal compulsion to attend.

The obligation under the Self-Quarantine Following Overseas Travel Directions is on the person who has travelled, and compliance with self-isolation has been monitored enforced. However, as an additional precautionary measure, the Court also made a direction that any person who has flu-like symptoms or who has travelled overseas in the last 14 days is not to enter court precinct (staff, legal practitioners, parties, witnesses, media, contractors and members of the public).

***District Court of Western Australia***

The biggest impact of the Covid pandemic has been upon the court's ability to conduct jury trials. Because of social distancing it has been necessary to suspend jury trials for a number of months. Our priority has been in relation to persons held in custody or who are vulnerable or with special needs. The court has wherever possible endeavoured to deal with these persons.

## **2 Do these legal reforms, if any, affect rule of law or human rights principles and, if so, please enumerate them?**

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### ***Federal Court of Australia***

Close consideration has been given to the principle of open justice. That has been accommodated in a variety of ways as best as possible by advertising the way in which members of the public including the media can and do observe proceedings conducted by video.

### ***Family Court of Australia***

The legal reforms implemented in Australia at a State and Federal level do not impact upon Human Rights. The current operation of the Courts primarily through Microsoft Teams or by telephone does somewhat impinge on litigants' right to a public hearing. However, while not being heard publicly in the sense of an ordinary open courtroom, the Family Court has implemented measures allowing members of the public who enquire with the Registry to be provided details to attend a hearing, with the consent of the Court.

### ***Federal Circuit Court of Australia***

The Family Court's response above also applies to the Federal Circuit Court.

### ***Magistrates Court of the Australian Capital Territory***

Not for the Magistrates Court, but there has been a controversy in relation to jury trials in the Supreme Court.

### ***Local Court of New South Wales***

Yes. The delay in finalising proceedings particularly where a person is in custody has an impact on human rights principles.

### ***District Court of New South Wales***

The concerns which arise are:

- (a) inevitable delays in the justice system;
- (b) concerns about due process when AVL is being used especially where litigants, witnesses and lawyers are having difficulties using AVL.

### ***Supreme Court of the Northern Territory***

If jury trials do not resume soon, the right to a timely trial may be affected. There is also a risk that people may be held on remand for a longer period of time than their likely sentence if found guilty. Where this is a risk, bail applications are being made and, where appropriate, bail granted, but that is not a complete solution.

***Land Court of Queensland***

For regionally based self-represented parties, particularly, limited internet and video-conferencing facilities affect their access to justice and their perception of the fairness of the process (particularly when facing off against a well resourced mining company or a state party).

***Magistrates Court of Queensland***

No.

***South Australian Employment Tribunal***

Not particularly. Other than the access to timely justice.

***Magistrates Court of South Australia***

Both reforms described above have obvious implications on civil liberties.

***Supreme Court of Tasmania***

The timely disposition of cases has been affected. Prisoners awaiting trial are having to spend longer in custody before their cases are heard.

***Magistrates Court of Tasmania***

There are no obvious rule of law or human rights issues with the Tasmanian legal reforms. The most obvious issues arising relate to the usual consequences of delay.

***Supreme Court of Western Australia***

While the extent to which the Supreme Court may perform its functions has been restricted, operations were continued to ensure that the rule of law was maintained in the State.

The suspension of jury trials that has been required because of COVID-19 has raised human rights issues. Delay in time to trial is not in the interests of justice. The human rights issues are magnified where an accused person is held in custody and liberty is at stake. For this reason the Court has prioritised the hearing of bail applications and applications for trials by judge alone.

**3 Have these legal reforms, if any, had any effects on the powers of heads of courts, judges and/or court administrators?**

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***Federal Court of Australia***

No.

***Family Court of Australia***

The judges of the Family Court have not had their powers impacted by legal reforms. The Court has seen the implementation of a national Registrar to manage the urgent matters filed in the COVID-19 list as an additional tool to assist in confronting the matters arising from the pandemic.

***Federal Circuit Court of Australia***

The Family Court's response above also applies to the Federal Circuit Court.

***Magistrates Court of the Australian Capital Territory***

No.

***Local Court of New South Wales***

The reforms have not had an impact on the powers per se. However, the Chief Magistrate and court administrators have been under significantly increased pressure having to monitor and respond to the effect of the COVID-19 legislation and to plan for how to minimise the impact of the increased delays in conducting hearings.

***District Court of New South Wales***

The powers of the Chief Judge and judges are hampered by the physical incapacities of the system.

***Supreme Court of the Northern Territory***

No.

***Land Court of Queensland***

- The powers have not changed, but the way in which they are exercised has. The court spends more time considering accessibility and facilitating fairness from a logistical perspective than I am used to doing.
- There is a Bill before the Qld Parliament which will provide additional powers in relation to time limits for commencing and advancing proceedings.

***Magistrates Court of Queensland***

No.

***South Australian Employment Tribunal***

No effect on “the powers”, but as Head of Jurisdiction I have been at the centre of all of the reforms made and the focal point of feedback, whether that be good or bad. April 2020 has been a very, very challenging month. Similarly, the court administrators have been under a huge amount of pressure to manage staff and the administration of the Tribunal in the COVID-19 environment.

***Magistrates Court of South Australia***

No.

***Supreme Court of Tasmania***

The reforms have not had any significant effects.

***Magistrates Court of Tasmania***

Under the Disease Emergency (Miscellaneous Provisions) Act 2020, the Attorney-General was empowered to declare that all proceedings in the Magistrates Court of Tasmania may be held in the manner determined from time to time by the Chief Magistrate. That Chief Magistrate is thereby empowered to determine the manner in which any proceedings are held despite any provision of the existing procedural or other laws relating to how proceedings are usually held.

***Supreme Court of Western Australia***

The legal reforms have not expressly affected the powers of heads of courts, judges and/or court administrators.

The Court has had to rely in some instances on its inherent jurisdiction to control practices and procedures to make directions to reduce the risk of COVID-19 transmission, where the rules of court did not contemplate a pandemic.

**4 What has been the impact of the legal reforms, if any, on activity in your court and, if possible and appropriate, please provide information distinguishing between civil, criminal and administrative matters?**

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***Federal Court of Australia***

Information not available.

***Family Court of Australia***

The Family Court has experienced a 39% increase in the filing of urgent applications over a four week period during March and April. Further to this individual Judges have been required to closely manage their matters to ensure trials are able to proceed by electronic means where possible. Inevitably, this means that some matters have simply had to be adjourned as they could not proceed, considering the circumstances of the matter, by electronic means or in the circumstances brought on by the pandemic.

***Federal Circuit Court of Australia***

The Family Court's response above also applies to the Federal Circuit Court with a 23% increase in urgent applications in family law matters.

***Magistrates Court of the Australian Capital Territory***

In order to adopt the recommended social distancing standards, the Court has had to reduce activity, including the postponement of a significant number of matters.

***Local Court of New South Wales***

See question 1.

***District Court of New South Wales***

This Court is running at about one-third of its capacity. There are very few criminal trials (only those by judge alone and they proceed slowly by (Apprehended Violence Order) AVL. Most civil trials settle. Some criminal sentencing hearings on appeals are being heard by AVL. There is no administration jurisdiction in this Court.

***Supreme Court of the Northern Territory***

See the answer to question 1. Civil matters are not affected other than the fact that some appearances of lawyers and witnesses may be by an AVL. Appeals are proceeding normally.



### ***Land Court of Queensland***

- This Court hears only civil and administrative cases. In the first few weeks, many matters were adjourned at the request of parties and while the Court made arrangements for better video-conferencing facilities and software.
- We are now returning to usual hearing loads, however, any breakdown in communications causes delays. We are dealing daily with telephone and video conferencing failures. Pressure is building for listings in the second half of 2020.
- We will shortly undertake virtual site inspections for some large mining project cases and expect the inadequacy of our facilities will make this a less satisfactory experience for the Court, and for the parties.

### ***Magistrates Court of Queensland***

No real issues.

### ***South Australian Employment Tribunal***

#### *Civil litigation*

The activity has changed slightly. The introduction of teleconferencing and videoconferencing has changed the way the activity of the Tribunal is done, although the work is still undertaken. There has been an increased use of teleconferencing and videoconferencing for hearings and at the time of writing one Full Bench appeal has been conducted via videoconference. Also, whilst there has been less courtroom hearings conducted, there has been more judgment writing.

### ***Magistrates Court of South Australia***

COVID-19 has had a massive impact on our courts as a whole, due to social distancing and isolation and quarantine measures introduced by us. However, the impact of legal reforms has been slight.

### ***Supreme Court of Tasmania***

There have been no criminal trials since February and there will be none until at least 21 July. In some criminal cases, pre-trial procedures have been delayed. Civil cases requiring oral evidence are not being heard. Other cases, including administrative law cases, generally speaking, are proceeding.

### ***Magistrates Court of Tasmania***

The most significant impact will be a very significant backlog.

Some daily lists are smaller because of matters administratively adjourned - but the administrative burden on the court has increased because it is more difficult and more time consuming to facilitate the large number of phone and/or video appearances required. Frequent technological issues both internal and external to the court adversely impact the quality of those appearances and on the ability to conclude them efficiently. These observations are relevant to all the divisions of the court: criminal and general, civil, administrative, youth justice and coronial.

The public health advice for people over 70 to remain at home has required one of the State's 15 magistrates to work from home for an extended period. That has caused some reallocation of his lists to other judicial officers together with additional administrative effort in relation to those lists. In addition to the reallocation of work among the magistrates, some judicial officers have cancelled their leave.

### ***Supreme Court of Western Australia***

#### *Criminal:*

- All jury trials were suspended from 16 March 2020.
- Trials by judge alone proceeded with social distancing in the larger court rooms.

#### *Civil:*

- From 18 March 2020, civil trials only proceeded if they could be accommodated in courtrooms where social distancing was possible. No new mediations were to be listed to the end of May 2020, save exceptional circumstances. For mediations already listed, personal attendance was at the discretion of the judicial officer.
- From 27 March 2020, civil trials involving witnesses giving oral evidence only proceeded under the express authorisation of the Chief Justice. This did not prevent civil proceedings, including trials, from otherwise proceeding by way of telephone or video-link, in relation to legal argument etc.
- Applications for admission of legal practitioners are usually heard monthly. For April and May 2020, only urgent applications for admissions were heard, with social distancing in the courtroom and one moving counsel for all the applicants.

#### *Court registry:*

- The registry was closed to the public from 18 March 2020.
- Filing of documents has been required to be by the court's electronic document system, email, registered post, fax or to a new secure drop box located outside the registry to be cleared twice per day.
- All payments for filing have been required to be by credit card using electronic forms.

### ***District Court of Western Australia***

The biggest impact of the Covid pandemic has been upon the court's ability to conduct jury trials. Because of social distancing it has been necessary to suspend jury trials for a number of months. Our priority has been in relation to persons held in custody or who are vulnerable or with special needs. The court has wherever possible endeavoured to deal with these persons.

## **5 Do ‘urgent’ cases receive a different treatment in your court, and was a special legal definition or specification of ‘urgency’ introduced for court proceedings and trials?**

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### ***Federal Court of Australia***

Urgent cases are still dealt with urgently, albeit mostly by video or by telephone.

### ***Family Court of Australia***

While urgent matters continue to be considered by the Court in the usual way, an additional COVID-19 list has been developed. In order to be considered for the COVID-19 List, the application must:

1. have been filed as a direct result of the COVID-19 pandemic;
2. pertain to an urgent matter;
3. be accompanied by an Affidavit (using the COVID-19 template affidavit for the FCoA or FCC) that addresses the criteria set out below;
4. if safe to do so, reasonable attempts have been made to resolve the issue, but were unsuccessful; and
5. pertain to a matter that is capable of being dealt with by electronic means.

The criteria to be addressed is as follows:

- why the matter is urgent;
- how the dispute has arisen as a direct result of COVID-19;
- details of any current allegations of risk to children or parties, such as a risk of child abuse or family violence;
- details of the parties’ reasonable attempts to resolve the dispute through negotiation, or details of why it was not safe to attempt to resolve the dispute by negotiation; and
- details of how it is proposed the Respondent can be provided with a copy of the court documents, including information about the Respondent’s current email address; and
- if applicable, annexing (or attaching a copy or photo of) any current family law orders, parenting plans, or family violence orders, e.g. an intervention order or domestic violence order.

### ***Federal Circuit Court of Australia***

The COVID-19 list, described above by the Family Court also operates in the Federal Circuit Court. Applications that are eligible will receive immediate attention. A dedicated registrar will assess the needs of each case and allocate them to be heard by a judge within 72 hours if necessary. The list operates nationally which provides greater flexibility in terms of allocation of judicial resources.

### ***Magistrates Court of the Australian Capital Territory***

The court has used the term ‘urgent’ to label matters requiring more priority than others. We have determined ourselves what we consider as needing higher priority and invited parties, when appropriate, to make application for other matters to also

be given priority. Matters are given priority depending upon the significance of any delay on the parties. For example, defendants who are in custody and applicants seeking immediate protection orders are given priority.

***District Court of New South Wales***

Yes, but there are very few and there have been no changes made for expedited matters.

***Local Court of New South Wales***

There is no special legal definition of urgency. However, priority is given to cases where the defendant is in custody.

***Supreme Court of the Northern Territory***

No special definition exists. Urgent matters (except jury trials) are being dealt with.

***Land Court of Queensland***

We clarified what we considered to be urgent, but that merely documented an existing approach. Urgent cases are always prioritised. Now they are dealt with on the papers or by video-conferencing wherever possible.

***Magistrates Court of Queensland***

Prioritisation where delay would cause substantial prejudice to a litigant

***South Australian Employment Tribunal***

Applicable with regards to Dust Disease litigation. Such cases are treated as urgent and are immediately referred to a judge's docket for management. The COVID-19 environment has not (yet) effected any of those cases.

Not applicable generally. Although we are considering introducing Fast Track Stream Rules to substitute cases that cannot proceed due to COVID-19 considerations, with straight forward cases that can proceed.

***Magistrates Court of South Australia***

Yes. Defendants in custody are given priority, and trials involving medical witnesses are given special consideration.

***Supreme Court of Tasmania***

Urgent cases are dealt with speedily. Arrangements for them are made on a case-by-case basis. During the pandemic there have not been any urgent cases that required oral evidence. No special definition or specification has been introduced.

### ***Magistrates Court of Tasmania***

There has been a very rapid move by the court to use video conferencing platforms (commonly Zoom and Skype) in order to conduct as much of its work as possible. This required significant additional resources (human, software and hardware) devoted to our court by the broader Justice Departmental IT services unit.

Formal e-filing has been introduced in the civil jurisdiction. Informal e-filing has been introduced in the criminal jurisdiction with the very significant cooperation of the police prosecution service.

Magistrates are doing more work remotely via video conferencing platform (particularly one judicial officer who has attained the age of 70 years - and those who convene after hours courts).

### ***Supreme Court of Western Australia***

The need to direct human and technological resources to those most pressing matters has required a restriction on civil trials. Criminal trials (particularly those involving the liberty of persons), bail applications and violence restraining order applications have taken priority.

The basis upon which an assessment of urgency is being made is affected by the other matters in the lists at the time of any particular trial, the resource allocation and technical support required to facilitate the matter and the time sensitive nature of the proceedings (for example, where a plaintiff may have a terminal illness and short life expectancy). The assessment of urgency is continually changing in response to the changing COVID-19 environment.

### ***District Court of Western Australia***

Our priority has been in relation to persons held in custody or who are vulnerable or with special needs. The court has wherever possible endeavoured to deal with these persons.

**6 If applicable, does the amount of money and, more generally, the value at stake in the case play a role in the treatment of it?**

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***Federal Court of Australia***

Information not available.

***Family Court of Australia***

This is not a consideration that determines differential treatment in the Family Court of Australia.

***Federal Circuit Court of Australia***

No.

***Magistrates Court of the Australian Capital Territory***

No, as most civil matters, other than those involving protection orders, have been postponed.

***Local Court of New South Wales***

No.

***District Court of New South Wales***

No.

***Supreme Court of the Northern Territory***

No.

***Land Court of Queensland***

Not in the way they are treated, but, in a practical sense, a well resourced party involved in a case with a lot at stake will ensure they can accommodate video-conferencing, facilitating an earlier and more effective hearing.

***Magistrates Court of Queensland***

Not in the Magistrates Court.

***South Australian Employment Tribunal***

Not particularly, although some proceedings concerning a small amount of money have been more readily identified as needing to be adjourned. Also, some cases involving a small amount of money have been identified as suitable to be determined “on the papers.”

***Magistrates Court of South Australia***

No.

***Supreme Court of Tasmania***

The pandemic has not resulted in cases with a lot at stake being treated any differently from how they were treated in the past. High stakes have always been a factor to be taken into account in case management on a case-by-case basis.

***Magistrates Court of Tasmania***

There have been no legislative or other amendments to the procedures relating to urgent matters. Urgent matters continue to be given priority according to the usual considerations. Criminal proceedings involving defendants who are in custody continue to receive high priority.

***Supreme Court of Western Australia***

No.

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**7 If applicable, in criminal cases, do those concerning arrested defendants receive a different treatment?**

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***Federal Court of Australia***

Information not available.

***Family Court of Australia***

Not applicable to the jurisdiction of the Family Court of Australia.

***Federal Circuit Court of Australia***

Not applicable.

***Magistrates Court of the Australian Capital Territory***

Yes, defendants who are in custody continue to receive priority listing.

***District Court of New South Wales***

Yes, accused in custody have priority over accused on bail but currently if trial is by jury, the trials are deferred.

***Local Court of New South Wales***

Defendants in custody are given priority when setting hearing dates.

***Supreme Court of the Northern Territory***

When the emergency ends, the list will be revisited so that trials where the defendant is remanded in custody will receive priority.

***Land Court of Queensland***

Not applicable.

***Magistrates Court of Queensland***

Priority for bail is given where time served is likely to be greater than the sentence. Few hearings conducted. When hearings start, defendants in custody will be given priority where possible.

***Magistrates Court of South Australia***

Yes. They are given priority.



***Supreme Court of Tasmania***

If a defendant is in custody, that has always been a factor warranting some priority. The pandemic has not changed that. No arrangements can be made for the trials of defendants in custody until jury trials resume.

***Magistrates Court of Tasmania***

No.

***Supreme Court of Western Australia***

Where an accused person is being held in custody, any application for bail or for a trial by judge alone will be heard urgently.

***District Court of Western Australia***

Our priority has been in relation to persons held in custody or who are vulnerable or with special needs. The court has wherever possible endeavoured to deal with these persons.

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## **8 What has been the impact of such legal reforms, if any, had on legal deadlines and procedural timeframes?**

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### ***Federal Court of Australia***

Information not available.

### ***Family Court of Australia***

At this time the Court is not capable of providing guidance as to data regarding procedural timeframes.

### ***Federal Circuit Court of Australia***

This data is not currently available.

### ***Magistrates Court of the Australian Capital Territory***

The Court's response to the COVID-19 crisis has caused delays in the progress of matters, in the order of months, and will most likely cause an increase in workload at the end of the emergency.

### ***District Court of New South Wales***

The backlog in crime is growing. Maintaining KPIs will be impossible whilst the current health crisis continues.

### ***Local Court of New South Wales***

See question 1.

### ***Supreme Court of the Northern Territory***

See question 1.

### ***Land Court of Queensland***

The COVID-19 Emergency Response Bill 2020, if passed, will facilitate Qld Courts being able to extend time for proceedings to be commenced and advanced.

### ***Magistrates Court of Queensland***

Courts date have been extended where procedural timeframes can't be met due to COVID.

### ***South Australian Employment Tribunal***

Obviously, timeframes have been pushed out due to the difficulty for the legal profession to comply with orders in the COVID-19 environment. At this stage, that effect is not particularly problematic, but could soon become so.

### ***Magistrates Court of South Australia***

We have implemented a blanket adjournment of all cases listed up until May 20, other than defendants in custody and major indictable matters. Criminal and civil trials are being called over, and those that can proceed are listed. This will cause a backlog of both criminal and civil matters. Whilst we are attempting to enforce mandated timeframes, we are more forgiving of failures to meet those requirements where there is a reasonable explanation.

### ***Supreme Court of Tasmania***

Tasmania has enacted legislation empowering the Premier to extend or reduce time limits fixed under legislative instruments. It is likely that limitation periods will be extended under that legislation.

In civil litigation, the timetables fixed for case management purposes are generally allowing practitioners longer for routine steps to be taken than was the case before the pandemic.

### ***Magistrates Court of Tasmania***

Some arrested defendants have experienced a delay of a day or so more than the usual delay in being presented before a court. The court has reduced the number of its out-of-hours courts because of the reduced availability of lay justices who convene those bail courts. These lay justices are older, usually retired persons, some of whom, in accordance with the advice of the director of public health, have been removed from the roster of justices dealing with bail matters by virtue of their age.

### ***Supreme Court of Western Australia***

Where trials or final hearings are delayed/ suspended, the deadlines for complying with pre-trial requirements (for conferral, filing documents etc.) has also generally been extended.

## **9 What is the role played in your court by IT, e-filing, smart and remote working in the management of cases as an effect of the legal measures, if any, implemented?**

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### ***Federal Court of Australia***

E-filing and remote managing and remote hearing of cases has been in practice for some time in the Court. It has now become much more widely spread.

### ***Family Court of Australia***

The Family Court of Australia has fast tracked a variety of IT Infrastructure to facilitate the continued operation of the Courts throughout the COVID-19 pandemic.

#### 1. E-Filing and digitization measures:

While the Court has supported e-filing through the Commonwealth Courts Portal for some time, we have almost wholly moved to have all material filed in this manner. The registry will only accept filing by email or in hard copy in limited circumstances, where it is made clear that the documents are unable to be uploaded to the Portal, for example where the litigant lacks the technological means or where the documents are too voluminous to upload;

Any material received by the Court by a means other than e-filing is additionally scanned or uploaded (depending on the format in which it is received) to our case management system. This has particularly assisted in staff working on matters from home without the need for access to physical files.

#### 2. Digital Court File:

The Family Court of Australia has been transitioning to a wholly electronic filing system known as the digital court file for a number of years. This transition was brought forward to Easter 2020 in light of the widespread digitisation required to support staff and the continued function of the Court during the pandemic. As such all new Court files created exist solely in an electronic format with no hard copy material retained by the Court. This upgrades a number of case management and administrative processes for new files.

#### 3. Microsoft Team/Virtual Hearings:

As mentioned, the Family Court rolled out the introduction of the Microsoft Teams platform, as was anticipated to occur late in 2020, to support both remote work and virtual hearings. The Family Court possesses a small amount of video conferencing equipment having relied heavily on the attendance of parties and practitioners in person or by telephone to date.

The Microsoft Teams platform has allowed Judges, some of whom were themselves required to self-isolate, to appear in Court to conduct proceedings from their homes. At present, due to restrictions of how we are able to record proceedings at least one staff member is required to be present in Court. However, the implementation has seen only some small difficulties in the running of trials. It has, however, led to greater and more comprehensive preparation to be required

by Chambers staff, including ensuring practitioners are well equipped and competent in using the platform by running a test session prior to trial. We anticipate as practitioners, judicial officers and court staff all gain more experience and become better versed with the platform this additional preparation will not be as extensive.

4. Secure Document Sharing (Sigbox):

To facilitate tendering of documents some Chambers have adopted the use of a secure document sharing platform called Sigbox. This operates in a manner largely the same as Dropbox or Google Drive. It allows the parties to provide their proposed tender documents digitally to the Court, without the size restrictions of email, and for Chambers staff to keep an updated folder of the tendered exhibits during the trial.

5. Increased Capacity of the Court's Network:

Some more generalised work has been undertaken expanding the capacity of the Court's networks to facilitate the additional load brought on by both the move to virtual hearings and staff across the Courts working remotely.

6. Remote Work:

Where possible, some Family Court staff have moved to working remotely. Some duties, such as work in the subpoena section and some work in the Registry is not able to occur remotely and staff in those sections have been individually assisted in managing their continued support of the Court by their managers. Chambers staff are working remotely where possible however work involving physical files and in court support for judicial officers continues to require their presence in Court. As an essential service, even if the federal or State and territory governments across Australia moved to prevent any attendance at workplaces the Courts have been provided an exemption. However, we are nonetheless following, where possible, the guidance requesting that, where possible, staff can be facilitated in working remotely.

***Federal Circuit Court of Australia***

The measures referred to above by the Family Court have also apply to the Federal Circuit Court. The courts share administrative services include IT services.

Both the Federal Circuit Court and the Family Court have also been encouraging the use of arbitration. Each court has appointed an arbitration judge to facilitate this.

The Court has also published information about available alternative dispute resolution, settlement and mediation services offered by stakeholders in all the states and territories.

***Magistrates Court of the Australian Capital Territory***

The Court has relied heavily on information and communication technology, including having parties appear and participate in proceedings remotely and, where appropriate, take steps in litigation by using emails. We have also brought forward the introduction of e-filing.

### ***District Court of New South Wales***

In general, the Court is using proceedings by AVL at this time and progress is hampered by inadequate physical, electronic resources.

### ***Local Court of New South Wales***

See question 1.

### ***Supreme Court of the Northern Territory***

Our front counters are closed. We have a system for electronic filing and document management in civil matters which was introduced not long before the emergency. In criminal matters documents are being filed by email.

### ***Land Court of Queensland***

- All documents except originating proceedings can be filed electronically (that was already the case pre COVID-19)
- Our use of eTrials and fully electronic files (mining hearings only) has been advanced during COVID-19.
- Registry staff roster between work from home and the Court and IT systems generally support that.
- Members and associates work from home unless it is necessary to be at Court (eg a hearing or preparation for a hearing that cannot be done remotely).
- Associates already facilitate active case management of all matters before the Court. The Court has been pro-active in approaching parties to discuss logistics for hearings. I believe this has averted requests for adjournments. The Court allows parties the opportunity to practice video-conferencing before their hearing, to enhance their level of comfort and competence (particularly self-represented parties).

### ***Magistrates Court of Queensland***

Courts date have been extended where procedural timeframes can't be met due to COVID.

### ***South Australian Employment Tribunal***

Our electronic case management system CaseVision has played a hugely influential role in maintaining the Tribunal's operations at a near full capacity in the COVID-19 environment. Staff were placed on a 50/50 work from home roster. That roster would not have been possible without CaseVision. Also, CaseVision allows members to operate remotely. Staff and members quickly became familiar with Microsoft Teams, with many meetings and some hearings being conducted via that platform. Without technology, the operations of the Tribunal would have ground to a halt.

### ***Magistrates Court of South Australia***

We are in the process of developing and initiating a new Electronic Court Management System. The Civil component of that system was to have been introduced in March. It has been delayed and is now predicted to be initiated in mid-May. The existing system, in both civil and Criminal, has been wholly inadequate in dealing with the changes in our file management processes caused by this pandemic.

### ***Supreme Court of Tasmania***

The change has been enormous. Hearings now routinely involve AV links to judges, counsel and parties at remote locations, with all connections made to a court room where a judge's associate operates IT equipment, including audio recording equipment so that transcripts can be provided. e-filing was limited to a pilot project involving a few firms before the pandemic, but is now the preferred method of filing. Judges are conducting directions hearings by telephone when they previously were usually conducted in court rooms. The Court's IT resources were very good before the pandemic. The Court has coped well as the result of hard work by its IT professionals and moderate additions to its IT resources.

### ***Magistrates Court of Tasmania***

The most significant impact on deadlines and timeframes are delays occasioned by:

- the adjournment of cases in order to minimise the number of people gathering in court buildings;
- parties, witnesses or counsel having few IT skills or technological difficulties on the day of the hearing or appearance.

### ***Supreme Court of Western Australia***

This Court already had e-filing requirements in place in the civil jurisdiction prior to the COVID-19 situation. This has meant that the Court has only had to make directions in relation to the small volume of matters in which parties were filing documents by attending the Court registry in person.

Video-conferencing (e.g. virtual meeting room, Microsoft teams, skype platforms) have been utilised for hearings, so as to limit appearances by parties and counsel.

- 10 What is the role played by the JCA in the drafting of such legal reforms? Was the JCA consulted by the Government before the adoption of these measures?**
- 11 Did the Government consult the High Council for the Judiciary and/or other judicial institutional instances or representatives before adoption of the aforesaid measures?**
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In regard to both questions, the JCA played no role and was not consulted. However, this is appropriate as the JCA is the association of individual judges and magistrates. If the governments were to consult, it would be more appropriate that they consult with the heads of the courts.

- 12 What is the attitude of bar associations and lawyers vis-à-vis such legal reforms?**
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The Law Council of Australia, the national association of law societies and bar associations, has been supportive on initiatives taken by courts and has not opposed, but expressed concern in regard to, privacy issues regarding a tracing app which the federal government has developed and encouraged all citizens to download.

It is not known what the attitudes of individual lawyers are to the reforms.